IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

(Before Owens, P.J., and Markey and Murray, JJ.)

PRESERVE THE DUNES, INC.,
A Michigan Not For Profit Corporation,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY and TECHNISAND, INC., A Delaware Corporation,

Defendants-Appellants.

Docket Nos. 122611, 122612

BRIEF ON APPEAL—APPELLANT TECHNISAND, INC.
ORAL ARGUMENT REQUESTED

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Vs.

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ENVIRONMENTAL QUALITY and
TECHNISAND, INC., A Delaware
Corporation,

Defendant-Appellants.

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APPELLANT TECHNISAND, INC.'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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STATEMENT OF THE QUESTIONS INVOLVED

I. DOES THE MICHIGAN ENVIRONMENTAL PROTECTION ACT, MCL 324.1701 *et se* ALLOW A CHALLENGE TO THE MICHIGAN DEPARTMENT OF ENVIRONMENT/ QUALITY'S ADMINISTRATIVE DECISION TO ISSUE A SAND DUNE MINING PERM WITHOUT TIME LIMITATION?

Circuit Court answer: No.

Court of Appeals answer: Yes.

Plaintiff-Appellee's answer: Yes.

TechniSand's answer: No.

MDEQ'S answer: No.

II. DID THE MDEQ PROPERLY AMEND TECHNISAND'S MINING PERMIT UNDER TI SAND DUNE MINING ACT, MCL 324.63702, BY AMENDING THE MINING PLAN (THE ORIGINAL PERMIT TO ALLOW MINING IN THE CRITICAL DUNE AREA OF TI LAND COVERED BY THE ORIGINAL PERMIT?

Circuit Court answer: Yes.

Court of Appeals answer: No.

Plaintiff-Appellee's answer: No.

TechniSand's answer: Yes.

MDEQ's answer: Yes.

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. OVERVIEW

On March 25, 2003, this Court granted Defendant-Appellant TechniSand, Inc.'s ("TechniSand") and the Michigan Department of Environmental Quality's ("MDEQ") applications for leave to appeal from an October 4, 2002, decision of the Court of Appeals. The Court of Appeals reversed the Berrien County Circuit Court's grant of partial summary disposition and judgment of no cause of action in favor of Defendants-Appellants in this MEPA case. See *Preserve The Dunes, Inc v Dep't of Environmental Quality*, 253 Mich App 263; 655 NW2d 263 (2002) (Court of Appeals Opinion, Ex A).[1] It remanded the case to the Berrien Circuit Court, directing entry of an order granting summary disposition to Plaintiff-Appellee, Preserve the Dunes, Inc. ("PTD"). In so doing, the Court of Appeals ruled on two issues, both of which are the subject of this appeal.

The Court of Appeals first reversed the Circuit Court's determination that PTD's challenge to TechniSand's amended permit to mine, issued on November 25, 1996 ("the amended permit") was time-barred. *Id.* at 304. PTD was formed on November 6, 1997. It filed its MEPA lawsuit on July 1, 1998, over 19 months after the MDEQ issued the amended permit, that allowed TechniSand to mine sand in a critical dune area. In reversing the Circuit Court, the Court of Appeals decided as a matter of first impression that "[T]here is no statute of limitations in a MEPA action" and that even administrative actions are subject to challenge at any time *Id.* at 304.

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[1] Preceding its October 4, 2002, Opinion reversing the circuit court, the Court of Appeals granted an injunction pending the appeal. (Verbal Order, Court of Appeals Docket, Event No. 72.) The September 9, 2002, order forced TechniSand to stop sand mining in the critical dune area, the only area in which the unique sand it needs is found. Although this Court issued a May 16, 2003, Order explicitly allowing mining in non-critical dune areas, TechniSand is still unable to mine the unique critical dune sand necessary to serve its customers.

The Court of Appeals also reversed the Circuit Court's conclusion that TechniSand met the statutory requirement for issuance of an amended permit. *Id.* at 315-316. In another statutory construction issue of first impression, the Court of Appeals interpreted the Sand Dune Mining Act ("SDMA"), MCL 324.63701 *et seq.*, holding that under MCL 324.63702, which governs sand dune mining permits in critical dune areas, TechniSand was ineligible for an amended permit because it could not qualify as an "operator" under either of two statutory exceptions to the prohibition against sand mining in critical dune areas. This holding contrasts with the Circuit Court's conclusion that TechniSand was eligible for the amended permit because the statute, as amended in 1989, grandfathered in existing mining operations, rather than the individual owners of such operations. The Court of Appeals rejected, like the Circuit Court before it, TechniSand's argument that it was eligible for the amended permit under MCL 324.63702(1)(a) because the original permit was issued before July 5, 1989.

II. THE AMENDED PERMIT

The extensive Opinion of Circuit Judge Paul L. Maloney thoroughly sets out the disputes, applicable law and findings of fact of significance to this appeal. TechniSand makes frequent references to this Opinion, which is included in the Appendix as Exhibit D, pp 35a-57a.

In 1994, TechniSand applied to what is now the MDEQ for a sand-mining permit *amendment* to mine sand on property owned by TechniSand in Hagar Township. The permit it sought to amend was originally issued to Manley Brothers of Indiana, Inc. on October 12, 1979. Part of the land regulated under the original permit was the so-called Nadeau (Nay-doo) Site. The Progressive Cell Unit Mining Plan and Reclamation Plan ("Mining Plan") incorporated into the original permit covered mining only at the Nadeau Site. The other property governed by the

permit was not included in the Mining Plan, although it was included in the description of the land covered by the permit. (Permits, Ex K; Affidavit of Rodger Whitener, Ex G.)

TechniSand's application for an amended permit included a 1996 Mining Plan, which proposed sand mining in a portion of the land covered by the original permit, the so-called "Nadeau Site Expansion" or the "Taube (Taw-bee) Road Expansion." (See Nadeau Site Area Map, Ex F.) No land not already under permit was included in the amended permit. However, the amended permit allowed mining in an additional 71 acres, i.e., the Nadeau Site Expansion, not previously covered by a Mining Plan. (Maloney Opinion, p 4, Ex D; Affidavit of Rodger Whitener, Ex G; DNR Correspondence, Ex H; Permits, Ex K.)

As stated in Judge Maloney's Opinion:

> On November 25, 1996, after several years of deliberation and significant negotiation with TechniSand regarding reduction of the environmental impact of TechniSand's planned mining at the site, the DEQ issued TechniSand an amended permit (Joint Ex, hereinafter "JE" 17) to mine 71 acres of the 126.5 acre expansion site. See Exhibit 2. The amended permit authorizes mining according to a mining and reclamation plan (Exhibit 22), including mining in the critical dune area. See Exhibits 1, 2, 5, 6, and 7. Cells 5, 6, and 7 of the plan are in the critical dune area. See Plate B, Exhibit 21. The expansion site is immediately adjacent to the so-called Nadeau Site, a tract of land with an existing permit which had been in force at the time of defendant's application for the expansion site permit since 1983 or earlier. See Exhibit 2. TechniSand's original permit application was in 1994. Indeed TechniSand prepared two separate environmental impact statements (EIS) required by statute, MCL 324.63704(2)(b). Exhibits 19 and 21. MCL 324.634701(g) defines the "environmental elements" that must be addressed in an EIS. The Court finds that the Exhibit 21 complied with the statute as to subjects covered and the completeness of the report. See MCL 324.63705. The record before this court explains in exhaustive detail that in order to foster protection of the resources on the site TechniSand made extensive amendments to the original application before the DEQ issued the permit in November 1996. See testimony of Roger Whitener.

27 of the 71 acres to be mined in the Nadeau Site Expansion lie in a "critical dune area" as defined by the Michigan Sand Dune Protection and Management Act ("SDPMA"), MCL 324.35301 *et seq.* (See 1996 Mining Plan, Trial Ex 21.) The mining of sand in critical

dune areas is regulated by the Sand Dune Mining Act ("SDMA"), MCL 324.63701 *et seq.*, which was amended in 1989 to restrict sand mining in critical dune areas, to the grandfathered operations.

The "Nadeau Pit," another, now nearly exhausted, TechniSand mine, lies between Blue Star Highway and Interstate 196 and has been mined for decades. The Nadeau Site Expansion is separated from Lake Michigan and the dunes with which it was originally connected by: (1) I-196; (2) the Nadeau Pit; and (3) residentially developed property (including the homes of some of the members of Plaintiff Preserve the Dunes) with an infrastructure of wells, septic systems, roads and driveways. The Nadeau Site Expansion was previously mined and logged. (Map, Ex F; Maloney Opinion, pp 1, 4, 20, Ex D.)

TechniSand's mining permit amendment encompassed the 1996 Mining Plan submitted by TechniSand. This revised Plan included a reduction in the area to be mined and the creation of a conservation easement, protecting an existing wetland and plants of special concern. After reclamation, the area will more closely resemble an undisturbed dune area and wetland than it did before mining or than it does at present. It will still be a critical dune area. (Maloney Opinion, pp 4-5, 19-20, Ex D.)

III. PTD'S CLAIM

A person later associated with PTD attended the permitting hearing before the MDEQ, but PTD was not founded until November 6, 1997. It did not exist at the time of the hearing. (PTD's Answers to TechniSand's Requests to Admit, Ex I.)

On July 1, 1998, PTD filed this lawsuit, seeking to prevent TechniSand from mining in the critical dune area pursuant to the amended permit. PTD challenged the MDEQ's issuance of the amended permit, arguing that TechniSand was not eligible for it. TechniSand and the MDEQ

moved for summary disposition, arguing that PTD's challenge was untimely because PTD failed to sue within 60 days of final MDEQ action granting the amended permit or within the 21 days allowed by MCR 7.104 & 7.101(B) for appeals pursuant to MCL 600.631.

The first trial judge, the Hon. David M. Peterson, reasoned that PTD's MEPA lawsuit was timely, holding the MEPA created an independent cause of action to prevent environmental harm, with no statute of limitations. However, he found that the amended permit "appears to have been properly granted." (Peterson Order, p 3, Ex E.)

After some discovery, PTD moved for summary disposition, arguing that the permit had not been, as Judge Peterson found, "properly granted." It argued that TechniSand did not meet the statutory requirement for issuance of an amended permit in a critical dune area. TechniSand argued that it was eligible for an amended permit under MCL 324.63702(1)(a) because the mining permit it sought to amend was issued before July 5, 1989, or that it was eligible under MCL 324.63702(1)(b) because it was an operator owning land adjacent to the property in which it was already authorized to mine.

Judge Scott Schofield, who replaced the retired Judge Peterson, denied PTD's motion. He held that PTD was time-barred from challenging the issuance of the amended permit and, regardless, that TechniSand met the statutory requirements for the issuance of an amended permit. Judge Schofield found that TechniSand satisfied the second basis for obtaining a permit, found at MCL 324.63702(1)(b), regarding adjacent property, but not the first basis, set forth at MCL 324.63702(1)(a), regarding the amendment of a pre-1989 permit.[2] He reasoned that the statute was intended to "grandfather in operations, not operators." Because the mining operation on

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[2] The full text of both subsections is set out as Exhibit Q in the Appendix, p 151a.

this property existed before July 5, 1989, and because the operations existed pursuant to a properly issued permit, Judge Schofield held that the MDEQ correctly issued an amended permit to mine the adjacent land in the critical dune area.

Judge Schofield ordered partial summary disposition to Defendants-Appellants, but allowed PTD to proceed to trial on its amended MEPA claim, which alleged that the amended permit violated the MEPA because it would allow TechniSand to destroy "a unique, irreplaceable, and fragile natural resource," i.e., part of the critical dune area. The Court of Appeals denied PTD's application for leave for an interlocutory appeal on December 9, 1999. (Court of Appeals Docket, Ex B.) After a bench trial, The Hon. Paul Maloney issued a verdict of no cause of action on the MEPA claim.

On PTD's appeal from the final judgment, the Court of Appeals reversed Judges Peterson and Schofield, holding that neither exemption in MCL 324.63702 applied to TechniSand because: (1) the first exception applies only when an operator is seeking to renew or amend a permit that already included the right to mine in a critical dune area; and (2) the second exception did not apply because it applies to "operators" and not "operations," and because TechniSand did not own the "adjacent land"[3] before 1989. It acquired it in 1991 from Manley Brothers of Indiana, Inc. as part of an asset purchase of an ongoing operation.

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[3] Throughout the case, the parties have referred to the Nadeau Site Expansion as land "adjacent" to the Nadeau Site, even though both parcels were subject to the Manley Brothers Mining Permit. The Nadeau Site Expansion is adjacent to the land already mined, but within the permitted property.

IV. THE TRIAL COURT'S FINDINGS OF FACT

A. Overview

The trial court made extensive and specific findings of fact, and determined that TechniSand's mining operation would not have a significant environmental impact. The trial court determined that: (1) the critical dune area in the Nadeau Site Expansion was not unique or irreplaceable; (2) this type of mining was specifically allowed by the Legislature; (3) the Nadeau Site Expansion had been mined previously; (4) sand is a natural resource critical to Michigan's economy; and (5) mining the Nadeau Site Expansion would not have a harmful impact on the site.

B. Lake Michigan Sand Dunes Are Not Geologically Unique

Judge Maloney's opinion, at page 1, described the sand dune area at issue, and sand dune areas in Michigan generally, as follows:

> The site, one mile landward of Lake Michigan, is approximately 126.5 acres in size and contains therein 71 acres of Critical Dunes Area as defined by Michigan statute (See MCL 324.35301 (c)). This critical dune area acreage represents one-tenth of one percent (0.1%)[[4]] of the statewide total. Interstate Highway 196 runs along the western [lakeside] border of the site. Indeed, this site is the only critical dune area containing elevated dunes east of I-196. Accordingly, this case does not involve sand mining immediately adjacent to Lake Michigan or the alteration of an esthetically pleasing environment such as Warren Dunes State Park in Bridgman, Michigan. The site at issue in this case is separated from Lake Michigan by I-196, Blue Star Highway, a large number of residences and county roadways. In addition, based on the evidence before the court, this site is the last acreage within critical dune areas in the entire state in which sand mining could be authorized by the DEQ. Therefore, regardless of this court's ruling as to this site, there will be no additional sand dune mining in critical dune areas of Michigan without a change in the law. [Maloney Opinion, p 1, Ex D.]

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[4] The 27 acres (cells 5, 6, & 7) of critical dune area included in the 71-acre Nadeau Site Expansion is actually 0.04% of the approximately 70,000 acres of critical dune area in the State of Michigan.

The trial court found nothing about the proposed site sufficient to override the legislative determination that, as property adjacent to an operation in which sand mining had been in existence prior to July 5, 1989, the parcel was an appropriate one for an amendment to allow sand dune mining in the Nadeau Site Expansion. (Maloney Opinion, p 4, Ex D.) Judge Maloney considered that the statutes do not define a "critical dune" or offer any protection for individual dunes. Moreover, some of the "critical dune areas" found to exist by legislative fiat are areas in which there are no sand dunes at all (Maloney Opinion, p 3, Ex D).

C. The Legislature Specifically Provided for Continuing Mining In Critical Dune Areas

The SDPMA prohibited the establishment of completely new mining operations in critical dune areas. It expressly authorized the expansion of existing operations, subject to comprehensive regulation that did not exist before the Act was passed. As plaintiff's counsel conceded at the May 24, 1999, hearing on PTD's Motion for Summary Disposition, the legislative history of the Act indicates that:

> The acts ensured that only limited development would occur in these [critical dune] areas, although mining *operations* that were already in existence were grandfathered in. [5/24/99 Hearing Tr, p 9, Ex J (emphasis added).]

The MEPA is derived from Article 4, Section 5.2 of the Michigan Constitution of 1963 which states:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Development is an appropriate purpose for a natural resource and the SDPMA provides for development. (Maloney Opinion, p 17, Ex D.)

D. The Taube Road Sand Mining Operation Existed For Decades Before the 1989 Amendments

The prior owner of the Nadeau Site and the Nadeau Site Expansion, and the owner at the time of the 1989 amendment, was Manley Brothers of Indiana, Inc. The parcel formerly owned by Manley Brothers, and sold to TechniSand, contains both critical and non-critical dune areas. Manley Brothers operated and mined the eastern portion of the parcel, i.e., the "Nadeau Site," since at least the 1980's. However, the Michigan Department of Natural Resources (now MDEQ) permit covered both the Nadeau Site and the Nadeau Site Expansion. The original Mining Plan provided for mining of 26.5 acres on the eastern portion of the Nadeau Site, in a non-critical dune area. (Whitener Affidavit, Ex G.)

On July 31, 1991, TechniSand purchased the assets of Manley Brothers, including the Nadeau Site and the Nadeau Site Expansion. The purchase was structured as an asset purchase because that was required by federal regulators. The Manley Brothers permit was transferred to TechniSand (Permit, Ex K).

E. The MDEQ Properly Granted TechniSand an Amended Permit To Mine Within A Critical Dune Area

Because Judges Peterson and Schofield had addressed on motion TechniSand's eligibility for the permit, Judge Maloney addressed only the question of whether issuance of the permit complied with MEPA, as required by MCL 324.1701. He determined that there was compliance. (Maloney Opinion, pp 4-5, Ex D.)

F. Critical Dune Areas Are Natural Resources

Judge Maloney found that, collectively, the critical dune areas of the state are a natural resource. He found that the proposed mining of the Nadeau Site Expansion would impact less than one tenth of one percent of the statewide total dune sand in critical dune areas. Judge

Maloney also concluded that, after mining and reclamation, the site would have all the desired features of a critical dune area. (Maloney Opinion, pp 1, 2n4, 8 & 19-21, Ex D.)

V. THE COURT OF APPEALS DECISION

On PTD's appeal, the Court of Appeals reversed the trial court's decision on two grounds: (1) the timeliness of PTD's challenge to TechniSand's mining permit, and (2) the merits of the MDEQ's decision to grant an amended mining permit to TechniSand. The trial court recognized that PTD advanced two distinct arguments: first, that TechniSand was not eligible for a permit; and, second, that TechniSand's mining activity violated the MEPA. The Court of Appeals confabulated these arguments. It confused the standard for evaluating a challenge to conduct potentially harmful to the environment with the administrative "standard" for determining eligibility for the permit. It rejected TechniSand's argument that the MEPA allowed challenges to the proposed mining activity, but not challenges as to who could engage in the activity.

The Court of Appeals did not recognize the authority of the MDEQ to make administrative decisions subject to review only within the limitations period of the Administrative Procedures Act (APA). The Court of Appeals erroneously applied the MEPA's substantive restrictions on potentially harmful conduct to an administrative decision. The Court of Appeals dealt with PTD's challenge to the issuance of TechniSand's amended permit as if it were a challenge to TechniSand's mining activities.

A. Timeliness

The Court of Appeals devoted approximately seventeen pages to determining that MCL 324.63702 "provides the standard and procedure for mining in critical dune areas in this MEPA action." 253 Mich App at 274-291. The statute's applicability was not in dispute. Both

the MDEQ and the trial court applied it in determining whether TechniSand qualified for an amended mining permit. What was in dispute was whether MCL 324.63702 was a pollution standard.

The Court of Appeals held that the MDEQ followed proper procedures under the APA. *Id.* at 293. Nevertheless, purportedly based in part on this Court's decision in *West Michigan Environmental Action Council v NRC*, 405 Mich 741; 275 NW2d 538 (1979), which involved a challenge to the impact of the proposed *conduct* on the environment *before* the issuance of a permit, the Court of Appeals held that the MDEQ's decision to grant a permit was open to challenge without time limitation. 253 Mich App 294-304.

The Court of Appeals held that PTD's claim that the permit was not lawfully issued was a "substantive challenge" to TechniSand's mining. It criticized the trial court for failing to recognize the distinction between substance and procedure. *Id.* at 293.

B. Amended Permits to Mine

The Court of Appeals considered whether TechniSand qualified for the permit pursuant to MCL 324.63702. It concluded the statute could not "reasonably be interpreted to 'grandfather in' parties who did not own a permit to mine in a critical dune area before July 5, 1989, and who did not own land adjacent to a critical dune area and a permit to mine in the noncritical dune area before July 5, 1989." *Id.* at 304.

The Court of Appeals held that the MDEQ and TechniSand's interpretation of MCL 324.63702 would render subsection 1(b) meaningless. *Id.* at 307. Subsection 1(b) allows mining in critical dune areas if the "operator holds a sand dune mining permit issued pursuant to section 63704 and is seeking to amend the mining permit to include land that is adjacent to

property the operator is permitted to mine, and prior to July 5, 1989 the operator owned the land or owned rights to mine dune sand in the land for which the operator seeks an amended permit."

According to the Court of Appeals, if "a sand dune mining permit that was issued prior to July 5, 1989," as provided by subsection 1(a), could be amended to include a critical dune area, there would be no need for subsection 1(b), which addresses amendments to include critical dune areas not covered by the original permit, but adjacent to the area covered by the original permit. *Id.* at 307-308. The Court did not say when subsection 1(a) could ever be applied.

ARGUMENT

I. INTRODUCTION AND STANDARD OF REVIEW

A. Review is De Novo

This Court reviews legal issues involving statutory interpretation de novo. *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 250; 632 NW2d 126 (2001). Both issues raised in this appeal are issues of first impression requiring statutory interpretation. Further, a trial court's grant of summary disposition is also reviewed de novo. *First Public Corp v Parfet*, ____ Mich ____; 658 NW2d 477, 479 (2003).

B. TechniSand's Objections to the Court of Appeals Decision

The Court of Appeals decision is erroneous for two reasons. First, PTD's challenge to the MDEQ's decision to issue TechniSand a permit was untimely. Although there are no time limitations on a challenge to an entity's *conduct*, there are time limitations on a challenge to the MDEQ's decision to grant a permit. Second, the amendment of TechniSand's mining permit was authorized by statute. If this Court holds that there is a time limit for challenging the issuance of a permit, it need not reach the merits of the second issue. TechniSand urges the

Court to reach both issues and cure the Court of Appeals' erroneous application of the MEPA, the SDMA and the SDPMA.

II. PTD FAILED TO MAKE A TIMELY CHALLENGE TO THE ADMINISTRATIVE DETERMINATION THAT TECHNISAND WAS A PROPER PARTY TO SEEK THE AMENDED PERMIT

The Court of Appeals transformed the MEPA into a super-statute, sweeping away long established administrative law and, by extension, any law that in any way relates to environmental issues. It held, in effect, that the MEPA repealed by implication any statute limiting the time for review of administrative decisions related to the MEPA.

The law in Michigan has always been that the APA governs administrative action involving the MDNR or the MDEQ. The MEPA itself makes available administrative procedures "subject to the administrative procedures act." MCL 324.1704(2). See also, *e.g.*, *Huggett v Dep't of Natural Resources*, 464 Mich 711, 714; 629 NW2d 915 (2001) (noting that proceedings under the APA were abeyed during litigation, but acknowledging that the APA applies to permitting decisions of the MDNR); *Bio Tech, Inc v Dep't of Natural Resources*, 235 Mich App 77, 82; 596 NW2d 633 (1999) (looking to the APA to determine licensing power of the MDNR); *South Macomb Disposal Auth v American Ins Co*, 225 Mich App 635, 666; 572 NW2d 686 (1997) ("[A] polluter who is required by a DNR order to take action to abate pollution may follow the order or contest it through administrative hearings [under the APA].").

Judicial review of agency action is limited to an assessment of "the impact of the defendant's *conduct* on the [environment]." MCL 324.1704 (emphasis added). The deadline for

appealing the issuance of a permit is 60 days, as established by MCL 24.304(1).[5] The Court of Appeals effectively repealed the APA's statute of limitations on challenges to administrative decisions, when the MEPA has no provision repealing that limitation period. It expanded by fiat the scope of review under MCL 324.1704 beyond the impact of the defendant's conduct on the environment to include the impact of the MDEQ's administrative decisions.

A. PTD's MEPA Claim Could Only Challenge TechniSand's "Conduct" as Likely To Endanger the Environment

1. Judge Peterson Correctly Limited PTD to Pursuit of a MEPA Claim that the *Conduct* Allowed under the Amended Permit Threatened the Environment

TechniSand and the MDEQ first responded to PTD's Complaint with separate motions for summary disposition, later amended, arguing that the time for challenging the appropriateness of the MDEQ's determination that TechniSand was entitled to amend the permit had expired. In refusing to dismiss the action in its entirety, Judge Peterson made it plain that he felt that the amended permit was "properly granted" under the SDMA. (Peterson Order, p 3, Ex E.)

Judge Peterson went on to say that the MEPA, and not the APA or the SDMA, which he acknowledged had statutes of limitation, protected the rights of individuals, without any limitation of the time for bringing their action, to prevent "serious damage to our environment, whether it be water or air or land or otherwise." He said that a challenge could be brought even if "some agency granted somebody a permit to do some thing . . . [a]nd that *activity* was conducted perfectly properly for a period of time." (Peterson Order, p 3, Ex E (emphasis

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[5] Alternatively, the time for bringing an appeal is 21 days under MCL 600.631, MCR 7.104 & MCR 7.101(B) (providing for 21 days for appeal from an administrative agency decision). The relevant statute and court rules are included in the Appendix as Exhibit R, pp 153a-154a.

added).) Judge Peterson held that the "MEPA created a sort of state environmental common law that creates an independent cause of action that's really -- has to have some way to proceed if this damaging *activity* is taking place." (Peterson Order, p 5, Ex E (emphasis added).)

MCL 324.1701(1), cited by the Michigan Court of Appeals in this case at 253 Mich App 275, provides that an action to protect the environment may be maintained "in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment or destruction." Judge Peterson kept venue in Berrien Court and not Ingham County, plainly indicating his conclusion that the potentially "damaging activity" claimed was not the issuance of the permit in Ingham County, but the conduct the amended permit allowed in Berrien County, i.e. mining under the amended permit.

The "damaging activity" alleged is the actual mining of sand pursuant to the amended permit. The Trial Court's Order of October 26, 1998, left open to PTD the right to attempt to prove its claim under MCL 324.1704, the section of the MEPA that empowers circuit courts to review conduct that threatens the environment, that the mining authorized by the amended permit would harm the environment. PTD lost that challenge. Judge Maloney found that TechniSand's mining would not, within the meaning of the MEPA, pollute, impair or destroy natural resources.

Under Judge Peterson's order, PTD did not have the right to pursue a claim that the amended permit was not properly granted. PTD's motion for summary disposition brought before Judge Schofield was, in effect, a tardy motion for rehearing. See MCR 2.119(F)(1). Judge Schofield, however, reached the same result Judge Peterson reached.

2. The MEPA is Not a Vehicle Authorizing Tardy Review of Administrative Agency Decisions

The Legislature made extensive provision in the MEPA for its coordination with the APA. It passed the MEPA to provide a cause of action "for the protection of the air, water, and other natural resources, and the public trust in these resources from pollution, impairment, or destruction." The statute was not designed to replace administrative proceedings. Nothing in the MEPA repealed the APA or MCL 600.631 or MCR 7.104 & 7.101(B), the statute and rules applicable to appeals from administrative agencies.

MCL 324.1705(1) empowers the court to allow the parties' intervention in pending administrative proceedings or the judicial review of such proceedings as "are available by law." See *Preserve the Dunes,* supra, 253 Mich App at 276. MCL 324.1704(2) authorizes the court to direct parties to seek "available" administrative proceedings, and provides that the administrative proceedings in which the parties may be directed to participate "shall be conducted in accordance with and subject to the administrative procedures act."

The only exception to the general applicability of the APA is that if proceedings are brought under the MEPA first, the court in which suit is first brought shall maintain jurisdiction for the purposes of judicial review, even though the APA provides that petitions for review be filed in the county where the petitioner resides or has its principal place of business or in Ingham County. See MCL 324.1704(4). If PTD had sued before the amended permit was issued, the MEPA would have provided a path for referral to agency action before review by the circuit court under the MEPA. After that agency action, the PTD's deadline for appealing back to circuit court would have been, at most, the 60-day deadline established by MCL 24.304(1). The Court of Appeals held, in effect, that when administrative proceedings are available, the APA

must be followed, but when they are they are complete and final and, therefore, not available, the APA can be ignored. Nothing in the plain language of the MEPA supports that result.

PTD admitted that "one or more persons who are now members of Preserve the Dunes, Inc., attended one or more of the public hearings conducted by the Michigan Department of Environmental Quality with respect to the application for amended permit which resulted in issuance of the permit to TechniSand on November 25, 1996." (Plaintiff's Responses to TechniSand's Request to Admit, Ex I.) PTD was incorporated on November 6, 1997, almost a year after the amended permit was issued (Ex I). There is no reason to allow individuals to mount a late challenge to an administrative decision they are aware of when made, by banding together in a membership corporation a year after the fact to those proceedings. Any challenge should have been brought in a timely manner pursuant to the APA, as required by the MEPA.

3. The MEPA Limits Judicial Review

Even where circuit court review of agency action under the MEPA is appropriate, the plain language of the statute limits review. MCL 324.1704(3) provides that:

> Upon completion of proceedings described in [MCL 324.1704], the court shall adjudicate the impact of the defendant's *conduct* on the air, water, or other natural resources, and on the public trust in these resources, in accordance with this part. In adjudicating an action, the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this part. [MCL 324.1704(3) (emphasis added).]

The statute directs the court to adjudicate the impact of the defendant's *conduct*, not the legal niceties of the permitting process. The MDEQ's determination is, of course, entitled to a presumption of regularity. See, *e.g.*, *Hitchingham v Washtenaw County Drain Comm'r*, 179 Mich App 154, 159; 445 NW2d 487 (1989) ("Generally, the courts will presume that the administrative body has acted correctly and that its orders and decisions are reasonable and valid."). The MDEQ must be presumed to have performed its duties in accordance with the law.

Id.; see also *Traverse Oil Co v NRC*, 153 Mich App 679, 692; 396 NW2d 498 (1986) ("An administrative body is presumed to have performed its duties in accordance with the law and is presumed to have conducted its responsibilities with regularity.").

Where an agency has adopted an interpretation of a statute which it is empowered to administer, the courts give great deference to such an interpretation, unless it is contrary to a logical reading of the statute. *Barker Bros Const v Bureau of Safety & Regulation*, 212 Mich App 132, 141; 536 NW2d 845 (1995); see also *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 416; 565 NW2d 844 (1997).

The MDEQ administers the SDMA. It has the sole authority to issue permits for mining in critical dune areas. The MDEQ's interpretation of the SDMA was that TechniSand was eligible for the amended permit under MCL 324.63702. The MDEQ is presumed to have addressed the MEPA concerns properly, as required by MCL 324.63709. The MDEQ's interpretation of the statute was logical and entitled to some weight. Its decision was in accordance with the plain language of the statute. The Circuit Court was correct in its two rulings that PTD could not challenge who was doing sand mining, but was limited to a challenge to the "conduct," i.e., the nature of the mining to be done. The Court of Appeals was wrong to reverse those decisions.

B. Cases Cited by PTD and Relied on by the Court of Appeals Are Not Apt

The cases cited by PTD and the cases relied on by the Court of Appeals do not stand for the proposition that courts have general authority to review details of administrative actions under the guise of the MEPA. They certainly do not, as the Court of Appeals has found, allow the courts to legislate by judicial pronouncement that, under the MEPA, the statutes that govern appeals from administrative decisions are voided. The MEPA simply has no such provision.

West Michigan Environmental Action Council v NRC, 405 Mich 741, 749-750; 275 NW2d 538 (1979), involved a *timely* challenge to the issuance of a permit. The plaintiffs filed the complaint that ultimately reached the Supreme Court eleven months *before* the permits were actually granted. It did not say the MEPA trumps the APA. This Court did not review the process by which the permits were granted. Instead, it said that under the MEPA, courts must conduct a de novo review of the impact of activity on the environment. The triggering event for review was the permitting process, because that allowed certain *conduct* to be challenged. The court reviewed the impact of the permitted activity, not the permitting process. *Id.* at 752. Judicial review of administrative action was timely in *Nemeth* because the action was brought while administrative proceedings were pending. Unlike *West Michigan Environmental Action Council*, the administrative proceedings here were concluded and all opportunity for judicial review of the permitting process was lost before suit was filed.

Nemeth v Abonmarche Development, Inc, 457 Mich 16; 576 NW2d 641 (1998), a case heavily relied on by both PTD and the Court of Appeals, was not a review of an administrative agency decision. This Court upheld a circuit court's grant of an injunction under the MEPA for construction activities that actually violated the Soil Erosion and Sedimentation Control Act, MCL 324.9101 *et seq*. The court described the plaintiff's suit under the MEPA as a claim "that the developers' violations of the SESCA provided sufficient evidence that the developers' *activities* violated MEPA by either polluting, impairing, destroying air, water, or other natural resources, or were likely to do so." *Nemeth*, 457 Mich at 20 (emphasis added).

The court enjoined the defendants in *Nemeth* because they conducted activities that impacted the environment in violation of the MEPA (and the SESCA), not because they were ineligible for the permits they had and abused. They were enjoined for what they did. As part of

the remedy, they were required to submit an adequate soil erosion control plan and to obtain new permits. Whatever plan they originally had obviously did not prevent soil erosion.

The Court of Appeals stretched this Court's holding in *Nemeth* beyond recognition to support its conclusion that the MEPA creates a "standard" for the judicial evaluation of long closed administrative proceedings. However, the MEPA issue before the court in *Nemeth* was described at 457 Mich 19 as being "whether violations of the soil erosion and sedimentation control act, MCL 324.9101 *et seq.* (SESCA), can form the basis of a prima facie case under the Michigan environmental protection act . . . ."

The conduct challenged in *Nemeth* was construction near the Manistee River. As this court described it, after the construction began:

> [W]ind and water on the exposed dunes carried sand, snow, fly ash, and other sediments from the construction site to the surrounding area. The sediments buried nearby parcels in drifts several feet deep, destroyed window casings, damaged siding, and were blown into the interiors of homes in the area. [*Id.* at 20.]

The issue before the court was whether the actual conduct of Abonmarche Development violated the MEPA by polluting nearby parcels and waterways with drifts of detritus "several feet deep," not whether Abonmarche Development was a proper party to do the construction. In reiterating its previous decisions on application of the MEPA and its interplay with other statutes related to the environment, this court said:

> The trial judge must find facts on which the plaintiff claims to have made a prima facie case under the MEPA, that is, what *conduct* of the defendant "has or is likely to pollute, impair or destroy the air, water or other natural resources." [*Id.*, citing *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 309; 224 NW2d 883 (1975) (emphasis added).]

Nemeth held that SESCA provided the appropriate "standard" for measuring harm to the environment because SESCA's purpose was "to protect Michigan waters from pollution, the

greatest source of which is sedimentation." *Id.* at 27. It is plain from a fair reading of *Nemeth* that it was the actual pollution of the ground and water resulting from conduct not complying with the standards for pollution control set forth in SESCA that this Court determined to be a MEPA violation, not some perceived bureaucratic failure in administrative proceedings. In the instant case, the circuit court held, in a decision not reversed on appeal, that the *conduct* of TechniSand, as authorized by the MDEQ, was not likely to "pollute, impair or destroy the air, water or other natural resources." Whatever prima facie case PTD had made was rebutted.

C. Challenges to Permits Distinguished from Challenges to Conduct

The MDEQ's decision as to who should be granted an amended mining permit at the Nadeau Site Expansion was neutral with respect to whether it would cause harm to the environment. The APA provided the "standard" for the review of that decision. The trial court found as a fact that TechniSand's proposed conduct would not, within the meaning of MEPA, pollute, destroy or impair the environment.

MCL 324.63702, the so-called "grandfather" clause of the MEPA, has absolutely nothing to do with the way in which the proposed mining was to be conducted. It strains credulity to believe that the Legislature regarded MCL 324.63702 as a "pollution control standard." The administrative decision on who can do the mining has nothing to do with any standard related to how the mining is conducted.

The Court of Appeals decision, misinterpreting *Nemeth*, effectively wrote the Legislature's provision that available administrative decisions are "subject to the administrative procedures act" out of MEPA. See MCL 324.1704(2). In declaring that the MEPA had no statute of limitations, the Court of Appeals eliminated MEPA's incorporation of The Administrative Procedures Act, including the statute of limitations for challenging administrative

decisions. See MCL 24.304(1). It also abrogated the Revised Judicature Act's provisions for an appeal from an administrative decision, *See,* MCL 600.631, made effective by MCR 7.104 & 7.101(B) (Ex R). Under the Court of Appeals decision in this case, parts of the APA and RJA no longer mean anything. They are now superfluous. The MEPA did not expressly repeal these statutes or rules. Without saying so, the Court of Appeals deemed them repealed by implication.

The Legislature's decision to permit early challenges to conduct likely to pollute, impair or destroy the environment is not the equivalent of a decision to permit courts to ignore final administrative decisions after the deadline for their appeal. Had the Legislature intended to repeal the APA statute of limitations with respect to MEPA actions, it could have easily said so in the MEPA. Repeals by implication are not favored. See *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 576; 548 NW2d 900 (1996) (acknowledging "the axiom that repeals by implication are disfavored"). Permitting an early challenge is not the same as allowing a tardy challenge. The Court of Appeals engrafted onto the MEPA something the Legislature did not put in the statute. Its decision should be reversed.

Judges Peterson and Schofield left PTD the opportunity of proving that the proposed conduct of TechniSand would harm the environment in violation of the MEPA, and PTD was unable to do so. Given its tardy claim and the plain language of the MEPA, PTD was only able to challenge TechniSand's proposed conduct. PTD was not entitled to a review of the procedure by which the permit was granted. It was more than a year late for that. The trial court recognized the distinction between challenging an administrative decision to issue a permit and challenging mining activity itself. As the case law cited above demonstrates, PTD walked the Court of Appeals down a road leading to the obliteration of that distinction. The error must be corrected.

III. THE EXPANSION OF TECHNISAND'S EXISTING OPERATION INTO A CRITICAL DUNE AREA WAS AUTHORIZED BY STATUTE

The Court of Appeals wrongly interpreted the relevant requirements for the issuance of a sand mining permit. It has written, not interpreted, the law. To accommodate the public interest in protecting critical dune areas, as well as the public interest in the industries that rely on sand dune mining, the Legislature did not outlaw mining in critical dune areas. It imposed strict requirements for permitting. It expressly allowed existing operations to remain and expand into certain critical dune areas. The statute itself says this, as does the legislative history. The fact that TechniSand did not own the land or hold the permit before 1989 is irrelevant, as there is no statutory restriction on transferring the permit.

A sand mining permit covered the Nadeau Site Expansion before 1989. When the Legislature amended laws relating to sand mining in 1989, it is presumed to have known that the entire area covered by the Manley Brothers' permit, including the critical dune area, would be included in the class of permits described in MCL 324.1702(1)(a), i.e., those permits which could be amended to allow for mining in critical dune areas.

The Legislature could have prohibited any expansion of mining into critical dune areas. It could have passed a statute prohibiting the amendment of mining plans under existing permits, if the amendment extended mining into a critical dune area. It could have outlawed transfers of permits to third parties. It did none of these. Instead, it provided expressly for the amendment of existing permits to authorize closely regulated expansion of mining activities into critical dune areas. The Court of Appeals has now held that the Legislature could not have meant what it said.

Calling TechniSand's position an "absurd result," the Court of Appeals rested its decision on an improper method of statutory construction, citing *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998) ("Statutes should be construed to avoid absurd

consequences, injustice, or prejudice to the public interest."). It did so despite this Court's explicit rejection of the "absurd result" doctrine, and its direction that the "absurd result" test should not be applied. See *Maier v General Telephone Co*, 466 Mich 879; 645 NW2d 654, 655 (2002), citing *People v McIntire*, 461 Mich 147, 155-159; 599 NW2d 102 (1999). The Court of Appeals even cited *Maier*, rejecting an "absurd result" argument made by TechniSand saying it carried "questionable, if any, weight." See 253 Mich App at 311. TechniSand advanced an absurd result argument in its brief before the Court of Appeals, which was filed in June 2001, before this Court made its position on the absurd result test clear in *Maier*. In contrast, the Court of Appeals issued this clearly erroneous opinion on October 4, 2002, citing both *McAuley* and *Maier*.

It was the Court of Appeals that created an absurd result. The Court of Appeals Opinion created the ultimate obstructionist tactic. It put those who ignore the administrative process in a better position than those who follow it. Those wishing to oppose through whatever means available a project that does not suit them, now have two choices. They can bring a timely court challenge to a proposed or recently issued permit under the MEPA, using the extensive statutory procedures laid out in that statute to coordinate it with the APA, as discussed in Section II, *supra*. Alternatively, they can do as the members of PTD did and ignore the statutory procedure set up both by the MEPA and the APA for as long as it suits their purpose, only bringing a challenge to an administrative decision months or years after those seeking the permit have relied to their detriment on its apparent validity.

The MEPA provided, before the Court of Appeals opinion, that only a party who intervenes promptly in the administrative process has a right to judicial review of the issuance of

a permit, within the 60-day timeframe set by the APA.[6] Now, the MEPA's provisions coordinating the MEPA with the APA are a dead letter.

A. The Manley Brothers/TechniSand Operation was Grandfathered

1. Environmental Regulation is Designed to Further Economic Use of Natural Resources

The MEPA is derived from Article 4, Section 5.2, the Michigan Constitution of 1963, which says:

> The conservation and *development* of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction. [Emphasis added.]

The Constitution, the MEPA, the SDMA and the SDPMA do not prohibit sand dune mining in critical dune areas. They allow it. The SDPMA specifically allows the expansion of sand dune mining into critical dune areas where an operation has existed prior to July 5, 1989. See MCL 324.63702.

2. By Its Plain Language, MCL 324.63702(1)(a) Authorized the Amended Permit[7]

There are two distinct statutory provisions under which a sand dune mining permit may be amended to allow mining in a critical dune area. The trial court and Court of Appeals

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[6] Or, alternatively, the 21 days provided by MCL 600.631, MCR 7.104 & MCR 7.101(B).

[7] The Court of Appeals implied in its opinion, 253 Mich App at 305, that TechniSand only argued that it qualified for an amended permit under MCL 324.63702(1)(b). TechniSand urged its eligibility under MCL 324.63702(1)(a) at every stage of the proceeding. See ¶ 15 of its Answer and pages 20-21 of its brief in the Michigan Court of Appeals, where the argument is sub-headed "MCL 324.63702(1)(a) Clearly Authorized the Amended Permit And TechniSand was Entitled to a Permit Amendment Under MCL 324.63702(1)(a)."

incorrectly ruled that TechniSand was not entitled to the exception contained in MCL 324.63702(1)(a) which provides:

> Notwithstanding any other provision of this part, the department shall not issue a sand dune mining permit within a critical dune area as defined in part 353 after July 5, 1989, except under either of the following circumstances:
>
> (a) the operator seeks to renew or amend a sand dune mining permit that was issued prior to July 5, 1989, subject to the criteria and standards applicable to renewal or amendment application.

TechniSand was an operator, which sought to amend a sand dune mining permit issued prior to July 5, 1989. The property on which the new mining operation was to be conducted, the Nadeau Site Expansion, was already under TechniSand's permit. (Whitener Affidavit, Ex G; Permit, Ex K.) TechniSand therefore did not seek a new permit to bring property adjacent to a permitted area under permit. Rather, it sought to amend its existing permit pursuant to MCL 324.63702(1)(a). Subsection 1(a) does not require that the operator seeking the amendment be the same operator that was originally issued the permit. The plain language of the statute only requires that the permit have been issued prior to 1989.

The Court of Appeals concluded that MCL 324.63702(1)(a) could not mean what it says. It decided that a permit for which amendment was sought had to allow mining in critical dune areas *before* amendment to qualify for amendment under either subsection 1(a)or 1(b) 253 Mich App at 304. However, the Court of Appeals identified nothing in the language of subsection 1(a) to support its nontextualist interpretation. Instead, the Court of Appeals looked to subsection 1(b) to narrow the scope of the plain language of subsection 1(a), concluding that if "a sand dune mining permit that was issued prior to July 5, 1989" could be amended to authorize mining in a critical dune area, there would be no need for subsection 1(b). *Id.* at 307-308.

The Court of Appeals did not give an example of when subsection 1(a) might apply. Under its interpretation stated at 253 Mich App 304, if Manley Brothers had continued to own the property and sought an amendment of its permit (the very same permit transferred to TechniSand) to expand mining into the critical dune area, it would not have been able to do so under either subsection 1(a) or 1(b).

The Court of Appeals nullified subsection 1(a), effectively holding that the only way a permit could be amended to encompass mining in a critical dune area was under subsection 1(b). Although the parties' argument over subsection 1(b) spoke in terms of the critical dune area being "adjacent" to the area permitted for mining, the Nadeau Site Expansion was always *within* the permitted area.

While the Court of Appeals was correct to note that MCL 324.63702(1) must be read to create a harmonious whole, it based its interpretation of the statute on an erroneous reading of subsection 1(a). The crux of the Court of Appeals opinion is that:

> A reasonable reading of MCL 324.63702 is that subsection a applies to the amendment or renewal of a permit that already permits mining in a particular already-defined area, while subsection b applies when the permit holder seeks to expand the permit to include adjacent land that contains a critical dune area and that it owned before July 5, 1989. [253 Mich App at 308.]

The Court of Appeals held that interpreting subsection 1(a) to allow mining in a critical dune area as argued by the MDEQ and TechniSand:

> [W]ould mean that the DEQ could grant an amended permit regardless of whether the additional land was adjacent and regardless of when the additional land was acquired. The absurd result of this interpretation would be that the DEQ could 'amend' any permit that existed before July 5, 1989, to include any critical dune area, no matter where it is located, and no matter when acquired, and, thus the amending power of the DEQ would entirely consume their prohibition on mining and critical dune areas. [*Id.* at 307.]

This imagined horrible is itself absurd. It is not at all what either TechniSand or the MDEQ argued for. Even if this Court were to agree with the outcome imagined by the Court of Appeals, it is not the role of the courts to rewrite a statute to suit its desired ends.

If this Court upholds the plain language and meaning of subsection 1(a), there will be no occasion for the subversion of legislative intent imagined by the Court of Appeals. Judge Maloney found that the Nadeau Site was the only place in the state of Michigan where amendment of a permit to expand into a critical dune area could be allowed. There is no other area in the State where there is an existing permit for mining that encompasses critical dune areas for which there is currently no mining plan.

3. Subsection 1(b) Does Not Require a Different Interpretation of Subsection 1(a)

Subsection 1(b) provides for permit amendment to allow mining in a critical dune area when:

> The operator holds a sand dune mining permit issued pursuant to section 63704 and is seeking to amend the mining permit to include land that is *adjacent to property the operator is permitted to mine*, and prior to July 5, 1989 the operator owned the land or owned rights to mine dune sand in the land for which the operator seeks an amended permit. [MCL 324.63702(1)(b) (emphasis added).]

Assuming that the Legislature meant what it said in subsection 1(a), that a permit issued prior to July 5, 1989, may be amended by the current permit holder to allow expansion of mining into critical dune areas in the area covered by the permit. Subsection 1(b) simply applies to already-owned adjacent land not covered by the permit. That is, subsection 1(a) applies to amending a permit to change the scope of mining within the permitted area, while subsection 1(b) applies to amending a permit *to add new land* to the permit. The Court of Appeals interpretation, applying subsection 1(b) to land already encompassed in an existing permit, renders subsection 1(a) superfluous.

Even reading subsection 1(a)'s use of the word "permitted" restrictively, to mean only that land which the operator is actually allowed to mine and not all of the land covered by the permit, when one recognizes that the only reason to amend an existing permit pursuant to subsection 1(a) is to allow mining in a critical dune area where the permit does not already allow mining, the Court of Appeals conclusion becomes clearly untenable.

If subsection 1(b) applies to land already covered by the permit, then what does subsection 1(a) apply to? There is simply no amendment left to which subsection 1(a) might apply.

4. TechniSand's and The MDEQ's Interpretation of Subsection 1(a) is Consistent with Legislative Intent

The MDEQ applied the proper criteria and standards applicable to an amendment application. It awarded the permit amendment to TechniSand as an operator applying for the amendment of a permit issued prior to July 5, 1989. The amended permit was granted with suitable restrictions and protections for the environment. The granting of a permit under the Sand Dune Mining Act presumes, that the concerns of the MEPA have been addressed and resolved, as required by MCL 324.63709.

The Court of Appeals held that the Legislature could not have meant what it said, negating subsection 1(a). Ironically, it reasoned that the MDEQ and TechniSand's interpretation of MCL 324.63702 would render subsection 1(b) meaningless. 253 Mich App at 307. Application of the statute's plain language renders nothing meaningless or nugatory, and encompasses the very situation in this case: the amendment of a permit that already includes critical dune area.

The Court of Appeals imposed its own judgment by adding a requirement that the Legislature did not see fit to include. It wrongly held that only those persons already conducting

mining operations under permits both existing in 1989 and covering critical dune areas can mine in those areas. *See* 253 Mich App at 304. The Court should reverse the trial court and the Court of Appeals holding that subsection 1(a) did not apply to TechniSand by its "plain" language. The MDEQ was correct to grant TechniSand an amended permit pursuant to MCL 324.63702(1)(a).

B. MCL 324.63702(1)(b), Under Which Judge Schofield Appropriately Granted Summary Disposition in Favor of TechniSand, is Concerned with Continuity of Operations, Not Identity of Operators

Although the trial court erred when it did not grant summary disposition under MCL 324.63702(1)(a), it did grant summary disposition in favor of TechniSand and the MDEQ under MCL 324.63702(1)(b). The Court of Appeals was wrong to reverse that decision, even under its view of the statute. Even if TechniSand's amended permit were construed as the type included in subsection 1(b), as TechniSand has argued and as the circuit court twice found, the "same owner" restriction is to prevent mining operations from buying adjacent land in order to expand their grandfathered operations, not to prevent the amendment of a permit to mine land owned by the operation before 1989. This Court must respect the Legislature's grandfathering of existing mining operations and reverse the Court of Appeals.

1. The Act Distinguishes Between "Persons" and "Operators"

The essence of PTD's argument is that Manley Brothers and TechniSand were different legal entities and that this makes a difference under subsection 1(b). The fallacy of the argument is the premise that the statute regulating sand dune mining, MCL 324.63701 *et seq.*, treats the word "person" as synonymous with the word "operator." It does not. The statutory scheme, taken as a whole, is concerned with existing operations, not the identity of the parties doing the operation.

The Court of Appeals, at 253 Mich App 307, quoted from *Karpinski v St. John Hosp-Macomb Center Corp*, 238 Mich App 539, 543; 606 NW2d 45 (1999), stating that "When construing a statute, the court should presume that every word has some meaning and should avoid any construction that would render the statute, or any part of it, surplusage or nugatory." However, the Court of Appeals then went on, at pages 309-310 of its opinion, to render nugatory the Legislature's distinction between the term "operator" and the term "operation" in various parts of the SDMA. In rejecting TechniSand's argument that subsection 1(b) dealt with operations and not the individuals conducting those operations, the Court of Appeals abandoned the rule of statutory construction it purported to be sustaining.

The Court of Appeals focused on the definition of operator contained in MCL 324.63701(J), which provides:

> "Operator" means an owner or lessee of mineral rights or any other person engaged in or preparing to engage in sand dune mining activities with mineral rights within a sand dune area.

However, reference to MCL 324.63074(1) indicates that the Legislature did not intend to use the words "person" and "operator" synonymously. That section of the statute provides:

> After July 1, 1977, a person *or* operator shall not engage in sand dune mining within Great Lakes sand dune areas without first obtaining a permit for that purpose from the department. [Emphasis added.]

The statute is phrased in the disjunctive. It speaks of persons or operators. Had the Legislature intended the word "operator" to mean any legally recognized entity, it would have been superfluous for the statute to also refer to a "person." It is a well-recognized rule of statutory construction that every word in a statute should be given meaning and not rendered surplusage. *DNR v Sarinec County Drain Com'n*, 173 Mich App 526, 531; 434 NW2d 181 (1988). Any statutory provision, like the SDMA's definition of operator, must be read within the

context of the entire statute, and not just in the context of a single section, to produce a harmonious whole. *Grand Traverse County v State*, 450 Mich 457, 463-464; 538 NW2d 1 (1995).

The definition of an operator includes the concept of a legal person, but is not limited to it. If the Legislature had not intended a broad or expansive definition of "operator," it would have adopted a definition of "operator" which included as a necessary part the concept of a legal person, as found elsewhere in the law. It would not, in the very statute to which the definition of operator applies, have drawn a distinction between "operators" and "persons," if it intended those words to be used synonymously.

Insight as to what the Legislature intended with respect to the definition of operator can be gleaned from the statutory definition of "person" that was in effect when TechniSand was pursuing its application for an amended permit in 1995. At that time, MCL 281.652(n), part of the definitional section of what was then the Sand Dune Protection Act, defined "person" as "an individual, partnership, firm, corporation, association, local unit of government, or other political subdivision of the state, or a state or state agency." This definition was not carried forward into the current version of the statute. However, that definition was broad. It included entities that may be, but frequently are not, legally recognized entities or "persons," such as "firms" or "associations." (See former SDPA Definitions, MCL 281.652, Ex P.)

2. The Statute Should be Interpreted to Further Legislative Intent

The primary purpose of statutory interpretation is to be guided by plainly expressed legislative intent. The Legislature was balancing competing interests. On the one hand, it sought to protect critical sand dune areas. On the other hand, it plainly intended to preserve ongoing sand mining operations, a valuable aspect of the state's economy conducted by enterprises with a

great deal invested in existing operations. The Legislature found not only that dune areas should be protected, but that there were benefits to be derived from the industrial or commercial use of dunes. MCL 324.35302(a). The Legislature found that critical dune areas of the state are, among many other things, "a unique, irreplaceable, and fragile resource that provides significant . . . economic . . . benefits to the people of the state." MCL 324.35302(c) recognizes that "the benefits derived from alteration, industrial . . . [or] commercial . . . use of critical dune areas shall occur only when the protection of the environment and the ecology of the critical dune areas for the benefit of the present and future generations is assured." The Legislature expected that sand in some critical dune areas would be exploited for commercial purposes. It sought to regulate, not prevent, that exploitation.

The Court of Appeals refused to recognize that the so-called grandfather clauses of MCL 324.63702 balanced competing interests, concluding that "TechniSand offers no persuasive authority for its assertion." 253 Mich App at 311. The authority is stated in the Constitution and statute. MCL 324.35302(c) expressly recognizes the benefits to be derived from "alteration, industrial . . . [or] commercial . . . use of critical dune areas." Article 4, Section 5.2 of the Michigan Constitution of 1963, from which the MEPA is derived, itself requires a balancing between "the conservation and development of the natural resources of the state . . . ."

The provision for the amendment of existing permits to allow mining in critical dune areas is a balance drawn between the need of industry in the State for the natural resource found in critical dune areas critical to their operation and the desire of the Legislature to protect the more than 70,000 acres of critical dune areas in the state. The Court of Appeals failure to see the legislative balancing that went into the statute is regrettably consistent with its unwillingness to apply the statute's plain language.

The Legislature limited mining in critical dune areas to instances when the environment and the ecology were adequately protected and where an existing, permitted operation was being expanded. This was done in TechniSand's amended permit. The mining process allowed will not adversely affect the Nadeau Site Expansion within the meaning of the MEPA. (Maloney Opinion, pp 19-21.)

Other sections of the relevant statutes concern themselves with existing operations, without regard to the formalities of enterprise. MCL 324.63706(2) established varying standards to apply to "a sand dune mining *operation*" that existed "before March 31, 1977 . . ." and "a sand dune mining *operation* that commenced after March 31, 1977." (Emphasis added.) MCL 324.63706(2)(c) prevents the department from issuing a permit for "the expansion of an existing sand dune mining *operation* if that expansion includes any cell-unit having an area exceeding 10 acres." (Emphasis added.)

MCL 324.63708(1) provides for the extension of sand dune mining permits "if the sand dune mining activities have been carried out in compliance with this part, the rules promulgated under this part, and the conditions of the sand dune mining permit issued by the department." In drawing a balance, the Legislature did not focus on technical legal rules related to ownership issues. Instead, it can be determined from the language of the statute and its history, that the Legislature intended to protect or preserve the fiscal integrity of ongoing operations or enterprises, as opposed to the interest of individuals or particular corporations in those operations. This statute focuses on operations and mining *activities*, not owners.

3. The Legislative History Confirms that the Legislature Grandfathered Operations, not Operators

If the plain language of the statutory scheme leaves any doubt, the legislative history supports the trial court's construction. The legislative intent behind MCL 324.63702 is to curtail

new mining operations in critical dune areas. The Legislative Analysis to the 1989 amendment states:

> Sand dune mining would continue under present law, although limits would be placed on new mining *sites*. The zoning provisions of the bill *would not apply to land now under sand dune mining permits*, but the DNR would be prohibited from issuing sand dune area mining permits within a critical dune area after the bill took effect unless the operator sought to renew or amend a sand dune mining permit that had been issued before the bill took effect, or the operator already had a mining permit and was seeking a permit for adjacent land which he or she owned (or owned rights in) before the effective date of the bill. [House Legislative Analysis, HB 4296, March 18, 1989 (emphasis added).]

This echoes and elaborates on the text of the bill itself, which provides for continued operations in its findings that "[t]he critical dune areas are subject to industrial, commercial, and residential uses, and alterations that will impair the resource without proper *planning and managing* of all of the following . . . ." HB 4296 (emphasis added). Moreover, the bill repeatedly excepted "uses . . . that are lawfully in existence at a site when the site becomes subject to [the] act as a critical dune area" from limitations on mining operations. HB 4296. Thus, the 1989 amendment to MCL 324.63702 did not contemplate curtailing then-existing sand mining. Rather, it managed the mining industry by cutting off new operations and grandfathered existing operations *by site* without regard for who held the permit to mine an exempted site.

Further insight can be gleaned from the Legislative Analysis accompanying HB 4296, which became 1976 PA 222, the precursor to MCL 324.63704. There, the circumstances underling the Legislature's decision to regulate sand dune mining is set forth:

> The unique composition of dune sand from the Lake Michigan area makes it [sic] use integral in a variety of industries. Dune sand is used to make highway concrete, glass moldings, and metal castings for the automobile industry, among others. The 6 sand mining companies operating in Michigan make this state that nation's leading supplier of foundry sand. About 5% of the Michigan shoreline is owned or leased by these companies. At the present time, however, sand mining is completely unregulated in Michigan. Mining permits, impact statements, and

reclamation plans are not required of sand miners by any state or federal statute. [House Legislative Analysis, HB 4038, September 10, 1976.]

When the Legislature set out to balance these concerns, it never expressly provided for the effect of a transfer of ownership. In light of the Legislature's failure to preclude a full transfer of rights, MCL 324.63702(1)(a) and (b) must be read as they plainly provide: to permit a subsequent owner of a grandfathered permit to act with the full rights of that permit, including the right to have it amended to expand into critical dune areas described in the original permit or to add adjacent land always owned by the operation.

C. The Manner of TechniSand's Acquisition of the Entire Nadeau Operation is Not Determinative

1. It was the Court of Appeals that Reached an Absurd Result

The Court of Appeals interpretation of MCL 324.63702 produces the absurd result that two transactions, identical in every way except for the mere corporate structure of the acquiring entity, could give rise to a grant of the permit modification in one instance and the denial in another. But for the fact that TechniSand was prohibited from acquiring the stock of Manley Brothers for reasons completely unrelated to the intents and purposes of the Sand Dune Protection Act (Fallon Affidavit, Ex O), there would be continuity in ownership and no question that the operation was entitled to the amended permit. The Court of Appeals absurd result is at odds with the clearly expressed legislative intent to preserve ongoing businesses and property rights and expectations, while affording some relief to over-utilization of important natural resources. Judge Maloney properly considered the MEPA, the SDMA, and the SDPMA so as to apply in practice the intent of the Legislature. (Maloney Opinion, pp 13-17, Ex D.) The question of who could mine the Nadeau Site Expansion was correctly determined

administratively, and Judge Maloney properly decided the question of what the permittee could do.

2. TechniSand Acquired the Entire Nadeau Operation

The Nadeau operation has, without dispute, been ongoing long before July 5, 1989. Paragraph 14 of PTD's First Amended Complaint alleges that operations have been conducted pursuant to a permit at the site "since at least 1983." It is this "operation" that has been "grandfathered" by the statute. The operation has not changed in nature or scope as a result of the acquisition of the entire operation by TechniSand. The "operator" of the Nadeau operation has always owned the land adjacent to the land being mined, which is the subject of the amended permit. How does it protect critical sand dunes to prohibit a successor in interest from mining exactly where the previous owner could mine? The distinction is arbitrary, unreasonable, and unsupported by the statutes.

As the Affidavit of Jeffrey Fallon establishes, TechniSand bought an ongoing enterprise, consisting of all Manley Brothers' operations in the State of Michigan. (Fallon Affidavit, Ex O.) The transaction was originally structured as a stock purchase, which would have made this issue completely moot. The stock purchase was forced to an asset purchase by the federal government for anti-trust reasons. The asset purchase agreement plainly contemplated the purchase of an ongoing enterprise, as opposed to unconnected parcels of real estate or odds and ends of equipment. Both before and after the effective date of the asset purchase, the operation remained exactly the same, using the same employees at the same location, with the same equipment and, by and large, selling to the same customers. The asset purchase agreement required that the nature of the operation remain unchanged in the weeks and months preceding closing and following closing. The corporation continued with the same collective bargaining agreement,

with the same union, both before and after the asset purchase. It has been treated as an ongoing enterprise for the purpose of workers compensation premiums and claims, unemployment law and similar areas of governmental regulation. It was similarly appropriate for the MDEQ to treat the Nadeau mining operation as the "operator" in the context of MCL 324.63702. Even if it is assumed that PTD had the right to raise these issues wholly unrelated to the activity proposed, it is plain that TechniSand was a proper party to apply for amendment of the permit it owned.

By refusing to allow the amendment of TechniSand's permit under subsection 1(a), which it acquired from Manley Brothers, the Court of Appeals wrote a prohibition on the transfer of those mining permits which are subject to amendment to allow mining in critical dune areas into the statute.

3. Corporate Formalities Should Not be Blindly Followed to Thwart Legislation

The Michigan Supreme Court has quite often recognized that corporate formalities should not be allowed to thwart the Legislature's actions. In *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984), this Court recognized that "the fiction of a distinct corporate entity separate from the stockholders is a convenience introduced in the law to subserve the ends of justice. When this fiction is invoked to subvert justice, it is ignored by the courts." In this case, effectuating the intention of the Legislature to protect existing enterprises or operations should not be subverted by an over-technical application of the rules related to transactions between corporations.

In practical effect, there was no impact at all on the nature of the operation or its impact on the environment resulting from the transaction being structured as an asset purchase instead of a stock purchase. Invalidating the permit that the trial court already determined was properly granted because of the format of the acquisition would be an improper result. It would be as

absurd as saying that if Manley Brothers was a partnership, that a separate "operator" would have been created by incorporating the operation, even if the operation had the same owners, used the same site, workers, equipment and sold to the same customers. Should mining companies currently operating in Michigan's critical dune areas change hands, the Court of Appeals construction of MCL 324.63702 would not allow any new "operator" to take their place. The Legislature's goal of protecting the dunes while permitting vital industry can be readily met without forced or strained applications of the statute.

Interpreting the SDMA as suggested by TechniSand is consistent with other principles of law, including the principle that restrictions on land use should be construed narrowly. Restrictions on the use of real property are not favored in the law. *Kotesky v Davis*, 355 Mich 536; 94 NW2d 796 (1959). In interpreting restrictive covenants, all doubts are resolved in favor of free use of the property. *O'Connor v Resort Custom Builders*, 459 Mich 335, 340; 591 NW2d 216 (1999). An excessively literal interpretation of the statute would unduly restrict transactions involving land and yield an absurd result inconsistent with the intention of the Legislature.

The SDPMA was intended to permit existing operations to continue, notwithstanding the Legislature's determination that critical sand dunes should be protected to some extent. An interpretation of the statute which would allow a continuing operation to use adjoining land is appropriate, since all the adjoining land in question has long been part of the same operation, and covered by the same original permit. The parties to the asset transaction did not regard the real estate as separate from the sand mining operation. There is no reason to apply the statute in a way that treats the real estate as something other than owned by the operator of this continuing enterprise. Title in all the assets that comprise the ongoing enterprise has always been unified. The right to expand the permit under MCL 324.63702(1)(b) ought not to hinge on the niceties of

corporation law, especially in the absence of an indication by the Legislature of an intention to delve into those niceties.

D. The Balance of Interests Favors Mining the Nadeau Site Expansion

1. Sand is a Natural Resource Critical to Michigan's Economy

Michigan's Constitution favors the development as well as the protection of natural resources. West Michigan dune sand is of vital importance to the foundry industry, particularly foundries serving the automobile industry. That is why *amicus curiae* support TechniSand's position. TechniSand is the largest supplier of industrial sand to foundries in the automobile business in the American Midwest. DaimlerChrysler, formerly known as Chrysler Corporation, purchased all of its foundry sand from TechniSand at the time of trial and did so for years. The sand came from Lake Michigan dune formations. (3/15/2000 Okell Trial Testimony Tr, p 429, Ex L; 2/28/2000 Fallon Tr, pp 11, 28-29, Ex M.)

Larry Stahl, a foundry expert employed directly by General Motors, testified that General Motors corporation uses Lake Michigan dune sand in all its Midwest foundries. (3/22/2000 Stahl Tr, p 999, Ex N.) Lake Michigan dune sand is particularly well suited for certain applications in the gray-metal foundries producing parts for the automobile industry because its chemical composition includes relatively low silica, relatively high iron oxide, relatively low acid demand and it provides a generally uniform and consistent distribution of grain sizes. Those sizes are ideal for foundry applications making parts with relatively fine tolerances. (3/22/2000 Stahl Tr, p 1002, Ex N; 2/28/2000 Fallon Deposition Tr, pp 12-14, Ex M.)

Michigan gray metal foundries, particularly those in the automobile industry, developed their processes over 100 years, relying on Lake Michigan dune sand (2/28/2000 Fallon Tr, pp 11-12, 25-26, Ex M.) Each deposit of sand has unique chemical and physical properties. Any

variation in any one of those properties necessitates extensive and expensive trial and error adjustment in the foundry processes in order to continue making high quality product (3/22/2000 Stahl Trial Tr, p 1009, 1012-1015, Ex N; 2/28/2000 Fallon Tr, pp 17-21, Ex M.) Howard Chapman of Construction Aggregates and Larry Stahl of General Motors testified that the process of changing from one Lake Michigan dune sand deposit to another that was only twelve miles away took General Motors nearly 2-1/2 years. (3/22/2000 Stahl Tr, pp 1009-1010, 1017-1018, 1028, Ex N.)

2. Mining Will Not Have Adverse Consequences on the Proposed Site

There will be a critical dune area left after TechniSand concludes its mining. The area will not be as high in elevation as the current dunes are in the area, but, particularly after reclamation, the site will not be greatly different in kind, character or quality than it is in its pre-mining state. The property has already been subjected to a great deal of human development. It has previously been logged and all the vegetation on it is second growth. Neither the flora nor fauna found on the site to be mined is unusual, exceptional or inadequately protected. (Maloney Opinion, p 9, Ex D.) Judge Maloney credited the testimony of the MDEQ's expert, Dr. Goff, who found that "the shoreline dune sub-system does not cross I-196 because of human development." The trial court also concurred with Dr. Goff's opinion "that the Taube Road site dune features do not rise to the level of ecological criticality." The court credited Dr. Goff's opinion "that the inland dune ecosystem will not be significantly affected by the mining as permitted." (Maloney Opinion, p 9, Ex D.)

The trial court found that there is nothing aesthetically or environmentally unique about the Nadeau Site Expansion. The dune itself is cut off from other nearby dunes by I-196. It is separated from the Lake Michigan shore by as much as a mile and, in addition to the interstate

without focusing on the identity of the operator. There is no question that the operation that the amended permit allowed to expand had been in existence well before July 5, 1989. TechniSand satisfied both exceptions to the prohibition on mining in a critical dune area. The Court of Appeals must be reversed.

Respectfully submitted,

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